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No. 93-100

Supreme Court, U.S.
FILED
SEP 20 1993
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In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL BUSINESS FACTORS, INC., PETITIONER

v.

EARVIE ROLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sovereign immunity of the United States bars an action to garnish the wages of a civilian employee of the Department of Navy.

2. Whether such a garnishment action may be removed from state court to federal court under 28 U.S.C. 1442(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A9) is unreported, but the judgment is noted at 991 F.2d 803 (Table). The opinion of the district court (Pet. App. A1-A4) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1993. Pet. App. A10. The petition for a writ of certiorari was filed on July 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c) (Pet. 1), but properly lies under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, National Business Factors, Inc., is a California debt collection agency. It was assigned for collection the accounts of respondents Earvie L. Rollins and his wife, Bridgette M. Rollins. Those accounts reflected charges against the Rollinses for hospital services provided by Brookside Hospital in November 1988. The Rollinses were, at all relevant times, civilian employees of the Department of Navy. Pet. App. A6-A7.

Petitioner filed a complaint in the Municipal Court of California, County of Contra Costa, Bay District, seeking the account balance of $554.50 plus interest and attorney's fees. The court granted a default judgment to petitioner in the amount of $880.19. Pet. App. A7.

After the default judgment was entered, the sheriff for Alameda County, California, issued a wage-garnishment order to Earvie Rollins's employer, the Naval Supply Center (now the Fleet and Industrial Supply Center) in Oakland, California. The Supply Center responded that it was precluded by federal law from complying with the garnishment order. Petitioner then served an order to appear for examination on the manager of civilian personnel at the Supply Center. After the manager did not appear, petitioner served her with a second order to appear. Each order to appear stated that a failure to comply was punishable by arrest and contempt sanctions. Pet. App. A7.

2. The United States Attorney then removed the case to the United States District Court for the Northern District of California and subsequently moved for dismissal or, in the alternative, for summary judgment. The district court granted the motion to dismiss and quashed both the order for appearance and the garnishment order. Pet. App. A4. The court initially determined that, as both parties agreed, removal of the action

was proper under the Ninth Circuit's decision in *Nationwide Investors* v. *Miller*, 793 F.2d 1044 (1986) (per curiam). Pet. App. A2. The court then held that under longstanding federal law—reflected in *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1845), and *Nationwide Investors*—the garnishment proceeding was barred by sovereign immunity. Pet. App. A2-A4.

3. The court of appeals affirmed. Pet. App. A6-A9. It upheld the district court's determination that, under *Buchanan* and *Nationwide Investors*, sovereign immunity bars garnishment proceedings against the federal government. Finding no "unequivocal waiver of * * * sovereign immunity" applicable in this case, the court "refuse[d] to create an exception to sovereign immunity for reasons of public policy," as petitioner had urged it to do. Pet. App. A9.

ARGUMENT

Petitioner presents two questions, neither of which warrants further review. The first question—whether sovereign immunity bars garnishment proceedings against the federal government—is controlled by this Court's decision in *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1845), which held that sovereign immunity does bar such proceedings. The second question—whether such proceedings may be removed from state to federal court—was not properly raised below and, in any event, was correctly decided in the affirmative. That question, moreover, does not warrant further review in this case.

1. "It has long been established * * * that the United States, as sovereign, 'is immune from suit save as it consents to be sued.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). This Court applied that principle in *Buchanan*, 45 U.S. (4 How.) at 20-21, to

hold that sovereign immunity barred the attachment of seamen's wages held by a Navy purser. See also *FHA* v. *Burr*, 309 U.S. 242, 244 (1940) (the ruling in *Buchanan* "was derived from the principle that the United States cannot be sued without its consent"). The attachment of wages owed to a federal employee was barred, the Court in *Buchanan* explained, because "[s]o long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury." 45 U.S. (4 How.) at 20-21.

Petitioner does not dispute that the garnishment proceeding at issue here would be barred under *Buchanan*. Moreover, petitioner does not contend that any Act of Congress waives the federal government's sovereign immunity from garnishment proceedings under the circumstances of this case. Cf. *FHA* v. *Burr*, 309 U.S. at 244-250 ("sue and be sued" clause waived immunity of Federal Housing Authority from garnishment orders). Instead, petitioner argues (Pet. 7) that this Court should overrule *Buchanan* because of "tremendous changes in both the facts and the law which have eroded the basis for the Buchanan decision." That argument is unpersuasive.

The continuing vitality of *Buchanan* has repeatedly been recognized by this Court[1] and the lower federal courts.[2] Writing for the Seventh Circuit, Judge Posner

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[1] See *Franchise Tax Board* v. *USPS*, 467 U.S. 512, 516-517 (1984); *McCarty* v. *McCarty*, 453 U.S. 210, 229 & n.23 (1981); *United States* v. *Shaw*, 309 U.S. 495, 500-501 & n.18 (1940); *FHA* v. *Burr*, 309 U.S. at 244; *Chicago & N. Ry.* v. *Alvin R. Durham Co.*, 271 U.S. 251, 257 & n.6 (1926); *Ex parte United States (The Western Maid)*, 257 U.S. 419, 433 (1922); *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 159 (1886).

[2] See, *e.g.*, *Arizona* v. *Bowsher*, 935 F.2d 332, 334 (D.C. Cir.), cert. denied, 112 S. Ct. 584 (1991); *In re Joliet-Will County Community Action Agency*, 847 F.2d 430, 432-433 (7th Cir. 1988);

recently observed that *Buchanan* is "a decision whose authority seems not to have been impaired by its great age." *In re Joliet-Will County Community Action Agency*, 847 F.2d 430, 433 (7th Cir. 1988). Indeed, petitioner cites no decisions that have gainsaid *Buchanan*'s holding or reasoning with respect to the immunity of the federal government from garnishment proceedings.[3]

The decisions following *Buchanan* have rejected the argument, advanced by petitioner here, that *Buchanan* was based solely on the administrative burdens of requiring the government to comply with garnishment orders. Pet. 7-8. In *McCarty*, this Court explained that, "[r]ather than resting on the grounds that garnishment would be administratively burdensome, *Buchanan* pointed out: 'The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended.'" 453 U.S. at 229 n.23 (quoting *Buchanan*,

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Palmiter v. *Action, Inc.*, 733 F.2d 1244, 1247-1250 (7th Cir. 1984); *United States* v. *Krakover*, 377 F.2d 104, 106 & n.3 (10th Cir.), cert. denied, 389 U.S. 845 (1967).

[3] The state court cases cited by petitioner are inapposite because they concern the issue of whether state or local governments—not the federal government—are "persons" for purposes of state garnishment statutes. Pet. 5, citing *Henderson* v. *Foster*, 319 N.E.2d 789 (Ill. 1974), and *Waterbury* v. *Board of Comm'rs*, 26 P. 1002 (Mont. 1891). See *FHA* v. *Burr*, 309 U.S. at 246-247 (state court decisions concerning amenability of "municipalities, counties and the like * * * involve considerations not germane to the problem of amenability to suit of the modern federal governmental corporation"); see also *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1707 (1991) ("in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it") (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (brackets supplied by Court in *Will*)).

45 U.S. (4 How.) at 20); see also *OPM* v. *Richmond*, 496 U.S. 414, 428 (1990). The Tenth Circuit similarly has rejected the argument that the *Buchanan* rule is inapplicable when garnishment appears administratively feasible: "Although compliance with the [attachment] order may require only another hole in a punch card and the issuance of two checks rather than one, the controlling factor is the fact of impact on the government rather than the extent of the impact." *United States* v. *Krakover*, 377 F.2d 104, 106 (10th Cir.), cert. denied, 389 U.S. 845 (1967). See generally *United States* v. *Stanley*, 483 U.S. 669, 680-683 (1987). Thus, the court of appeals in this case was faithful to decisions of this Court and those of other circuits when it declined to "change the law of sovereign immunity" enunciated in *Buchanan*. Pet. App. A8.[4]

Moreover, petitioner errs in suggesting (Pet. 7) that courts are free to modify the scope of sovereign immunity based on changed circumstances. "[I]t rests with Congress," not the courts, "to determine * * * whether the United States may be sued." *Minnesota* v. *United States*, 305 U.S. 382, 388 (1939). Indeed, the courts may entertain suits against the United States only when Congress has "unequivocally expressed" an intent to waive sovereign immunity in the text of a statute.

[4] In any event, requiring the government to comply with garnishment orders would not only create significant administrative burdens but also expose the government to suits by the federal employees whose wages were garnished. See *United States* v. *Morton*, 467 U.S. 822, 824-825 (1984) (servicemember sued federal government for honoring garnishment order issued by state court that allegedly lacked personal jurisdiction over servicemember). For that reason, when Congress waived immunity from garnishment actions enforcing child support or alimony obligations, it simultaneously immunized the United States, its officers, and entities from liability with respect to payments made in accord with that waiver. 42 U.S.C. 659(f); see *Morton*, 467 U.S. at 827-836.

United States v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014-1015 (1992) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), quoting in turn *United States* v. *King*, 395 U.S. 1, 4 (1969)). Even then, the courts may not "enlarge" a statutory waiver "beyond what the language requires." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).

Congress has not waived the government's sovereign immunity from the garnishment proceeding at issue here. Congress has waived the immunity of the United States to garnishment actions only in cases seeking child support and alimony, 42 U.S.C. 659, in cases involving postal employees, 39 U.S.C. 401(1), and "in a few other isolated situations such as cases involving the Federal Housing Authority." *Nationwide Investors*, 793 F.2d at 1048. The existence of those statutory waivers reflects Congress's recognition that garnishment proceedings to attach the wages of federal employees are otherwise barred. Cf. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698, 702-703 (1979). Because there is no statutory waiver applicable in the present case, the courts below correctly held that the garnishment proceeding had to be dismissed for lack of jurisdiction. See *Mitchell*, 463 U.S. at 212; *Testan*, 424 U.S. at 399.

2. Petitioner now contends (Pet. 6-7) that there is a conflict among the circuits on the issue whether garnishment proceedings are "civil actions" that may be removed from state court to federal court under 28 U.S.C. 1442(a)(1).[5] Petitioner did not, however, contest

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[5] Section 1442(a) provides in relevant part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

the propriety of removal in the courts below. On the contrary, in both the district court and the court of appeals petitioner argued that removal was proper under 28 U.S.C. 1442(a)(1). See Plaintiff's Memorandum of Points and Authorities in Support of Removal of Action from State to Federal Court 3-6; Pet. C.A. Br. 4. Because the removal issue was not properly preserved in the courts below, petitioner should not be permitted to raise it in this Court. See, *e.g.*, *United States* v. *Williams*, 112 S. Ct. 1735, 1738-1739 (1992). In any event, the district court correctly determined (in a ruling undisturbed by the court of appeals) that the case was removable under 28 U.S.C. 1442(a)(1). Moreover, there is no conflict among the courts of appeals warranting further review in this case.

a. Section 1442(a)(1) of Title 28 authorizes the removal of "[a] civil action * * * against * * * [a]ny officer of the United States * * * for any act under color of such office." Petitioner does not dispute that the manager of civilian personnel at the Naval Supply Center is an "officer of the United States" for purposes of Section 1442(a)(1). Nor does petitioner dispute that the "under color of office" requirement in Section 1442(a)(1) was satisfied by the government's allegation of a colorable federal defense—*i.e.*, sovereign immunity—to the garnishment proceeding. See *Mesa* v. *California*, 489 U.S. 121, 139 (1989). Instead, petitioner contends that a garnishment proceeding is not a "civil action" for purposes of Section 1442(a)(1) because the government is only a

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

stakeholder in such a proceeding. Pet. 6-7, 8-9. That contention is incorrect.

In *FHA* v. *Burr*, 309 U.S. at 244-250, this Court held that a garnishment proceeding could be maintained against the Federal Housing Authority because it fell within the scope of a provision authorizing the agency to "sue and be sued." In so holding, the Court determined that a garnishment proceeding is a "suit for the collection of a claim." *Id.* at 249. The Court relied on case law broadly construing the term "suit," when used in a statute, to encompass any proceeding in which "a right is litigated between parties in a court of justice." *Id.* at 247 n.8.

In common usage, the term "action" is synonymous with the term "suit." See *Black's Law Dictionary* 28, 1434 (6th ed. 1990); Fed. R. Civ. P. 2. Since Section 1442(a)(1) does not define the term "action," that term should be accorded its ordinary meaning. See, *e.g.*, *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993). Because the terms "action" and "suit" are synonymous in common usage, and because this Court held in *Burr* that the term "suit" encompasses garnishment proceedings, the term "action" should likewise be construed to embrace garnishment proceedings. Thus, *Burr* supports the conclusion that a garnishment proceeding is a "civil action" for purposes of Section 1442(a)(1).

Franchise Tax Board v. *USPS*, 467 U.S. 512 (1984), is not to the contrary. There, this Court stated that "it is far from clear that the Postal Service may remove a garnishment action when it is merely a stakeholder and the real party in interest is the employee." *Id.* at 524 n.19. To be sure, that statement is in some tension with the statement in *Buchanan* that money owed to a federal employee, while in the possession of the federal government, "is as much the money of the United States, as if it

had not been drawn from the treasury." 45 U.S. (4 How.) at 21.[6]

Nonetheless, for three reasons the statement in *Franchise Tax Board* expressing doubt whether the Postal Service may remove garnishment proceedings does not undermine the decision of the court of appeals in this case and the decisions of other courts of appeals holding that garnishment proceedings are "civil actions" that may be removed to federal court under 28 U.S.C. 1442(a)(1). First, the statement in *Franchise Tax Board* is dictum; the propriety of the removal of garnishment proceedings was not before the Court. 467 U.S. at 514, 524 n.19; see *Hexamer* v. *Foreness*, 981 F.2d 821, 823 (5th Cir. 1993) (characterizing statement in *Franchise Tax Board* as "dicta"); *Nationwide Investors*, 793 F.2d at 1046 (same). Second, the statement did not concern 28 U.S.C. 1442(a)(1), the removal provision under which the present case was removed.[7]

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[6] See also *Flast* v. *Cohen*, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting) (United States holds funds subject to spending power "not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large"); *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947); compare *Honda* v. *Clark*, 386 U.S. 484, 498 (1967) (Attorney General is mere stakeholder of fund, "for it neither comes out of the common weal nor will any surplus inure to the Treasury").

[7] In *Franchise Tax Board*, the Postal Service relied on a different removal provision, 39 U.S.C. 409(a), in asserting a right to remove garnishment proceedings. That provision authorizes the removal of "[a]ny action * * * to which the Postal Service is a *party*." 39 U.S.C. 409(a) (emphasis added). This language lends itself more readily than does the language of Section 1442(a)(1) to the "real party in interest" requirement that the Court in *Franchise Tax Board* suggested might preclude removal of proceedings in which the Postal Service is "merely a stakeholder and the real party in interest is the employee." 467 U.S. at 524 n.19. Compare 28 U.S.C. 1442(a)(1) (authorizing removal of an action "against" a federal officer).

Most importantly, as the court of appeals observed in *Nationwide Investors*, "garnishment proceedings against postal employees are *sui generis* due to the special statutory provisions concerning suits against the Postal Service." 793 F.2d at 1046. The key provision upon which *Franchise Tax Board* was based permitted the Postal Service to "sue and be sued" in its own name, 39 U.S.C. 401(1). See 467 U.S. at 517-522. The Court construed the "sue and be sued" clause to indicate Congress's intent that the Postal Service be subject to some of the same burdens, including wage garnishment, as private commercial enterprises. See *id.* at 518, 520. In the present case, there is no statutory waiver of sovereign immunity—much less a broadly worded waiver such as a "sue and be sued" clause—that could justify treating money in the hands of the Navy the same as money in the hands of a private enterprise rather than as public funds. Cf. *Nordic Village*, 112 S. Ct. at 1014-1015 (cases involving "sue and be sued" clauses "do not * * * eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign") (internal quotation marks omitted).[8]

b. In *Murray* v. *Murray*, 621 F.2d 103, 106-107 (1980), the Fifth Circuit held that a garnishment proceeding against the Veterans' Administration was not a "civil action" removable under Section 1442(a)(1). That decision appears to conflict with the Ninth Circuit's decision

[8] Because petitioner seeks to reach funds in the possession of the government, this case is unlike *Stafford* v. *Briggs*, 444 U.S. 527, 542 (1980), in which damages were sought from "the pocket of the private individual who happens to be—or formerly was—employed by the Federal Government." The Court in *Stafford* found it "dispositive" that "it [wa]s against individuals and not against the Government that a money judgment is sought." *Id.* at 542 n.10. Accordingly, petitioner's reliance (Pet. 9) on *Stafford* is misplaced.

in *Nationwide Investors*, 793 F.2d at 1046, and the Eighth Circuit's decision in *Overman* v. *United States*, 563 F.2d 1287, 1290-1291 (1977), which upheld the removal of garnishment proceedings under Section 1442(a)(1).[9] Nonetheless, the apparent conflict does not warrant further review in this case. First, as noted above, the removal issue was not properly raised below. That fact, standing alone, weighs heavily against further review.

Second, the state of the law in the Fifth Circuit is not altogether clear. In *Hexamer*, 981 F.2d at 823-824, the Fifth Circuit relied on *Murray* to hold that the Postal Service could not remove a garnishment proceeding against it under either Section 1442(a)(1) or 39 U.S.C. 409(a). For reasons discussed above, however, decisions addressing the removability of actions against the Postal Service are "*sui generis*," *Nationwide Investors*, 793 F.2d at 1046, and thus are of only limited applicability in cases involving other government entities. Moreover, in another recent decision the Fifth Circuit held that a federal officer could, under Section 1442(a)(1), remove an action in order to challenge a subpoena directed to him. *Louisiana* v. *Sparks*, 978 F.2d 226, 231-233 (1992). In so holding, the Fifth Circuit relied on the Ninth Circuit's decision in *Nationwide Investors*, describing it as "adopt[ing] a similar approach in an analogous case." 978 F.2d at 232. In sum, one recent Fifth Circuit decision

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[9] Petitioner asserts (Pet. 6) that *Nationwide Investors* and *Overman* conflict not only with the Fifth Circuit's decision in *Murray* but also with Tenth and Eleventh Circuit precedent. Petitioner does not, however, cite any Tenth Circuit decisions with which *Nationwide Investors* and *Overman* conflict, and we are aware of none. The Eleventh Circuit has cited *Murray* in only one decision of which we are aware, *Loftin* v. *Rush*, 767 F.2d 800, 804-805 (1985). In *Loftin*, the Eleventh Circuit suggested that it considered *Murray* to be binding in that circuit, but it upheld removal in the case before it, finding *Murray* distinguishable.

relies on *Murray*, but another recent Fifth Circuit decision relies on *Nationwide Investors*, the decision with which *Murray* is in apparent conflict. The two recent decisions thus create some doubt whether the apparent conflict between *Murray* and *Nationwide Investors* remains a live one.

In the absence of a clearcut conflict, the removal issue does not warrant further review in this case. The question whether garnishment proceedings may be removed is, as a practical matter, only one of timing from petitioner's perspective. As the Ninth Circuit explained in *Nationwide Investors*, "if a federal officer disobeys the state court Order to Appear, she could be prosecuted for contempt and could then remove under § 1442(a)(1) as a federal officer 'sued or prosecuted' in state court." 793 F.2d at 1046. Thus, even if the government cannot remove a garnishment proceeding, it "will have the power to remove simply by waiting to be sued directly." *Id.* at 1047. For that reason, a decision barring the government from removing garnishment proceedings would benefit a judgment creditor in petitioner's position, if at all, only by delaying—but not preventing—removal. The questionable benefit of such a delay to petitioner is not so significant as to warrant further review in this case.[10]

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[10] That is not to say that the removal issue might not warrant this Court's review at some point in the future. Whereas the consequences for a judgment creditor of a decision barring (or allowing) removal of a garnishment proceeding are minimal—involving only timing—the consequences for the federal official against whom a garnishment order is directed may be significant. Under *Murray*, the federal official may be required "to disobey state court process so that the government can obtain a federal forum." *Nationwide Investors*, 793 F.2d at 1047.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1993